



## WSFR Best Practices for Third-Party Agreements

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**Summary:** This document gives WSFR staff best management practices to consider when reviewing grant proposals and advising States on maintaining control of WSFR-funded projects that occur on real property that financial assistance recipients do not own.

**Audience:** WSFR staff

**Program:** WSFR-administered grants

**Background:** The Office of Inspector General (OIG) auditors cited deficiencies in current guidance for property where WSFR financial assistance recipients do not hold title, but where Federal financial assistance was used to improve property and/or habitat. For example, WSFR recipients commonly build boat ramps and shooting ranges on property owned by a subrecipient or other third party including State agencies (other than the fish and wildlife agency), municipalities, or other partners. When State fish and wildlife agencies are working in these partnerships, they must protect the Federal investment using a legally binding instrument available in that specific State such as, but not limited to, a lease agreement, easement, Memorandum of Understanding (MOU), or Memorandum of Agreement (MOA).

**Authorities:**

1. [Administrative Requirements, Pittman-Robertson Wildlife Restoration and Dingell-Johnson Sport Fish Restoration Acts, \(50 CFR 80\)](#)
2. [Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, \(2 CFR 200\)](#)
3. [Useful Life of Capital Improvements Funded by Federal Assistance Grants, \(522 FW 18\)](#)
4. [OIG Report No. R-GR-FWS-0002-2012, Re: Loss of Control of Third-party Agreement on Real Property Bound by an MOU](#)

**Guidance:** Recipients often use funds available under a WSFR award to improve or modify real estate that they do not own. Recipients may also use these funds to provide public access to land or water owned by third parties for activities such as hunting, fishing, target shooting, and boating. Recipients may lease land or acquire easements on property to limit development or other ownership rights. The legally binding instrument recipients use to protect or secure property is essential to maintaining control of the WSFR-

funded project and protecting the Federal interest in the project.

The State fish and wildlife agency may not be able to hold a lease or easement if another State agency owns the site. In these circumstances, WSFR must ensure recipients use a legally binding agreement (e.g., a MOU or MOA) to protect the Federal interest. The definition of grant agreement at 2 CFR 200.51 emphasizes that awards must be used to carry out a public purpose. In discussing financial management, 2 CFR 200.302(b)(4) tells recipients they must have effective control to ensure funds are used solely for authorized purposes. 2 CFR 200.331(d) also addresses the monitoring of subrecipients to ensure the project continues for authorized purposes. 50 CFR 80.134(b) supports this by requiring recipients to use a capital improvement for its authorized purpose during its useful life. Termination during the useful life of assets acquired with WSFR financial assistance or during a specified public access period requires the Regional Director's concurrence under 50 CFR 80.137. WSFR will not approve an award that would allow a subrecipient or third party to: (a) terminate an agreement at its discretion during the project's useful life, or (b) alter public access after a specified period without WSFR's concurrence. WSFR will not allow a recipient to terminate an agreement based on a justification that the circumstances requiring the termination were beyond the control of the subrecipient or third party. Recipients and subrecipients or third parties must mutually agree on any provisions for termination or amendments, including responsibilities and/or compensation should the agreement be terminated early. In the discussion below, we list award components that could affect or be affected by WSFR awards on property where the recipient does not hold title. WSFR staff must review third-party agreements before approving a project and decide whether recipients have considered and/or addressed the following:

**Discussion:**

**A. Compliance** - Include guidance for compliance with Federal and State laws and regulations, and references sufficient to identify those authorities.

**B. Conditions** – Address: each party's responsibilities including operations and maintenance; the conditions for use by the public and any restrictions on such use; enforcement of safety standards; and insurance requirements.

**C. Credit** - Consider whether the agreement will require the third party to acknowledge or give credit to the Federal program(s) in all future reports or advertisements produced that pertain to the project.

**D. Duration** – Ensure the agreement's term is long enough that the benefits received align with the value of the Federal investment.

**E. Liability** – Consider any landowner liability issues for public access required by an award. State laws and landowner insurance policies may help decide whether this should be addressed in an agreement.

**F. Fees** - Consider how to handle any fees charged before and after the capital improvement project has been constructed/completed.

**(1)** Financial assistance recipients must:

**(a)** Clearly describe the fees that subrecipients or third parties may charge for facilities,

**(b)** Notify subrecipients or third-parties of the requirements for notifying the financial assistance recipient if they choose to change any fees, and

**(c)** Include language in the third-party agreement about whether user fees must be used for general operations and maintenance (O&M).

**(2)** Financial assistance recipients may consider using fees received before the end of the period of performance as match using the cost-sharing method for program income.

**G. Maps/Site Plan** - Include maps or a site plan. Maps should show the geographic location of the property to clearly identify location. It is critical to include structures, level of public access, or other public benefits that existed on the property before the WSFR-funded improvement, amenity, or access was added, especially when monitoring. If there is no map of the improvements, WSFR cannot determine what was accomplished when field reviewers are monitoring the project. This is especially important for a future

WSFR-award manager that has no background or familiarity with the award.

**H. Monitoring** – Include a long-term monitoring plan. Recipients must:

- (1) Consider turnover in staffing or changing duties for those responsible for monitoring or maintaining the facility,
- (2) Clearly identify future site-monitoring requirements,
- (3) Insert language in the agreement about State agency staff requirements for site inspections of land and facilities to ensure that they are fulfilling award purposes,
- (4) Communicate how they will manage financial and performance records, and
- (5) Clearly state the rules and processes for future site inspections in award documentation.

**I. Notice of Federal Participation (NOFP)** – For any project that meets the criteria for a capital improvement, we must require and record a NOFP along with the instrument that allows for facilities or structures to be located on the property (e.g., lease, easement, or other legally binding agreement.) For the Boating Infrastructure Grant program the requirement is at 50 CFR 86.18. A WSFR Regional Office may direct or a recipient may require a NOFP even if the project does not meet the threshold for a capital improvement. Alternatively, if the Regional Office approves, the terms of the NOFP could be incorporated in the legal instrument that allows the WSFR-funded improvement to be located on the property. When the Regional Office approves this approach, the instrument does not necessarily need to be recorded in the Recorder of Deeds' office.

**J. Operation and Maintenance (O&M) Responsibilities** - Provide O&M responsibilities of all parties involved. O&M may include (but is not limited to) mowing and vegetation control, litter removal, garbage can placement and removal, restroom services and maintenance, other concessionaire services, general maintenance of facilities and structures, and major maintenance or repairs of facilities and structures. The grant recipient may provide additional O&M responsibilities. If fees are collected, the agreement will include how fees will be used to address O&M and whether further Federal funds may be requested for future O&M.

**K. Proprietary Interest** - Insert language in the agreement that by accepting Federal funds, the financial assistance recipient acknowledges that the Federal Government has a legally prescribed interest in the capital improvement throughout its useful life. Should the subrecipient or third party destroy or alter the use of the capital improvement during its useful life, it must reimburse the recipient in proportion to the cost of the project minus depreciation according to depreciation requirements at 2 CFR 200.436.

**L. Public Access** – When working with a private, third-party entity, States must ensure that the third party understands that Federal funds are being used, which may result in a requirement for some degree of public access. If one of the purposes of a grant project is public access, the third-party agreement must clearly support this. WSFR staff will determine whether public access is adequate on a case-by-case basis. To ensure public access, WSFR will place a special term and condition on all awards where WSFR financial assistance will be used to fund renovation, construction, and/or operation and maintenance on property a subrecipient owns. The special term and condition will stipulate that award recipients (State fish and wildlife agencies) must protect WSFR's investment with a legally binding instrument such as a lease agreement, easement, Memorandum of Understanding (MOU), or Memorandum of Agreement (MOA). For purposes of this process, the term *public* refers to people in general, and is not limited to a particular group. The legally binding instrument must be included in the grant file and:

- Designate the amount of public access.
- Include the WSFR-prescribed method used for determining public access to facilities.

The WSFR prescribed method used to determine the amount of public access is:

- (1) *A reasonable number of regularly scheduled and posted hours of availability must be given to the general*

*public that reflects, at minimum, the amount of the Federal and State investment;*

*(2) Hours of operation may take into consideration safety and security issues, but must not impose impediments such as mandatory membership or excessive fees beyond those needed to offset maintenance and management costs;*

*(3) If there is potential for closing down a site for targeted, non-public use, the recipient must define a process where the third party must notify the public of any changes in availability and must compensate the recipient when it reduces the minimum public access defined in the agreement. The preferred method is for the third party to offer additional public access at an alternate time that compensates for the interruption; and*

*(4) If there are gates, locks, or other controls to access, the third-party must clearly indicate at the control point how the public may gain access to the facility.*

**M. Signage** - If signs are displayed at the facility or structure, include language that gives credit to the Federal financial assistance program that provided funding. Describe any State agency requirement to post signage and maintain signage at the completed project. Signs may include:

**(1)** State agency name;

**(2)** Appropriate WSFR Program symbol and name, and acknowledgement that the WSFR Program funded the project;

**(3)** Acknowledgment of any partners or their logos;

**(4)** Hours of public access;

**(5)** Locations and/or methods of access;

**(6)** Contact information in case of emergency; and

**(7)** Web site address for more information.

**N. Useful Life** - Establish the useful life (see 522 FW 18.5 B), and what would happen in the event the third-party partner chooses to limit use below the minimum required in the agreement or remove the WSFR-funded improvement before the end of its useful life. The agreement should include expectations if the project is still viable beyond the expected useful life, for example, does the project continue to be used in the same manner or does it revert to the total control of the third party. Define the process should unexpected circumstances reduce the useful life of a project. Define how additional operation and maintenance funds from future grants affect useful-life expectations. This could include a situation where there was no initial WSFR-funded or State fish and wildlife agency-funded investment, but only operations and maintenance. In that case, a useful-life assessment may consider how the operations and maintenance could extend the useful life of the existing property and/or associated appurtenances or amenities. Then, appropriate processes and expectations should be included. When determining useful life, recipients must:

**(1)** Clearly define the entire project and project area;

**(2)** Depending on the size and extent of the project, define the useful life of each individual component or the entire project; and

**(3)** Clearly identify the period of the useful life or extended period of the useful life.